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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
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| 09/554,969 | 05/23/2000 | GAYLE MARIE FRANKENBACH | 7258X | 1835 |

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ROBERT B AYLROR
THE PROCTER & GAMBLE COMPANY
11520 REED HARTMAN HIGHWAY
SHARON WOODS TECHNICAL CENTER
CINCINNATI, OH 45241-2422

EXAMINER

HARDEE, JOHN R

ART UNIT

PAPER NUMBER

1751

9
DATE MAILED: 02/07/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

A.9 9

Office Action Summary

Application No.
09/554,969

Applicant(s)
Frankenbach et al.

Examiner
John R. Hardee

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1751



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on _____
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1 and 12-39 is/are pending in the application.
- 4a) Of the above, claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 12-39 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claims _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are objected to by the Examiner.
- 11) ☐ The proposed drawing correction filed on _____ is: a) ☐ approved b) ☐ disapproved.
- 12) ☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

- 13) ☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).
- a) ☐ All b) ☐ Some* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

- 14) ☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

- 15) ☐ Notice of References Cited (PTO-892)
- 16) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 17) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____
- 18) ☐ Interview Summary (PTO-413) Paper No(s). _____
- 19) ☐ Notice of Informal Patent Application (PTO-152)
- 20) ☐ Other: _____

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DETAILED ACTION

Claim Rejections - 35 USC § 103

1. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.
2. Claims 1 and 12-39 are rejected under 35 U.S.C. 103(a) as being unpatentable over WO 97/03169. The reference discloses concentrated fabric softening compositions made using a principal solvent with a ClogP of about 0.15 to about 0.64 in combination with ester quats (abstract). Compositions may further comprise solvents such as ethanol and isopropyl alcohol, which have much lower Clog P values (see examples). Examiner takes the position that "about 0.15 to about 0.64" reads on ClogP values outside that range. Solvents outside this range may be added (claim 53). Suitable ester quats are depicted in Fig. 1 on p. 18 and Fig. 2. on p. 23. The use of mixtures of quats is taught at the bottom of p. 17. Compositions may further comprise up to about 2% of electrolytes, such as calcium and magnesium salts, especially the chlorides, to improve the stability of the compositions (para. bridging pp. 93-94). The examiner takes the position that the ester quats exhibit the claimed phase transition temperatures, as they meet the claimed structural limitations. This reference differs from the claimed subject matter in that it does not disclose a composition which reads on applicant's claims with sufficient specificity to constitute anticipation.

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It would have been obvious at the time the invention was made to make such a composition, because this reference teaches that all of the ingredients recited by applicants are suitable for inclusion in a surfactant composition. The person of ordinary skill in the surfactant art would expect the recited compositions to have properties similar to those compositions which are exemplified, absent a showing to the contrary.

In the case where the claimed ranges overlap or lie inside ranges disclosed by the prior art, a *prima facie* case of obviousness exists. *In re Wertheim*, 541 F.2d 257, 191 USPQ 90 (CCPA 1976); *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed Cir. 1990).

Response to Arguments

3. Applicant's arguments filed January 29, 2002 have been fully considered but they are not persuasive. Applicant argues that it would not be obvious, in view of the reference, to use the recited amounts of electrolyte, because the examples and the preferred range taught in the reference is lower than what is claimed. This is not persuasive because a prior art reference may be relied upon for all that it would have reasonably conveyed to one having ordinary skill in the art, including nonpreferred embodiments. Disclosed examples and preferred embodiments do not constitute a teaching away from a broader disclosure or nonpreferred embodiments. *Merck & Co. v. Biocraft Laboratories*, 874 F.2d 804, USPQ2d 1843 (Fed. Cir.), *cert. denied*, 493 U.S. 975 (1989). *In re Burckel*, 592 F.2d 1175, 201 USPQ 67 (CCPA 1979); *In re Lamberti*, 545 F.2d

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747, 192 USPQ 278 (CCPA 1976); *In re Mills*, 470 F.2d 649, 176 USPQ 196 (CCPA 1972); *In re Susi*, 440 F.2d 442, 169 USPQ 423 (CCPA 1971).

Applicant argues that the person of ordinary skill in the art would not know to use higher levels of electrolyte to achieve clear or translucent compositions. This is not persuasive because the person of ordinary skill in the art could make clear compositions from following the teachings of the reference. The compositions are disclosed in the abstract as being clear. If high percentages of electrolyte are important in applicant's compositions, applicant should claim higher electrolyte percentages than those taught in the reference.

4. Examiner notes that claim 16 was mistakenly omitted from the rejection in the first office action. The list of rejected claims on the cover sheet was correct.

5. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event,

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however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

6. Any inquiry concerning this communication or earlier communications from the examiner should be directed to the examiner, Dr. John R. Hardee, whose telephone number is (703) 305-5599. The examiner can normally be reached on Monday through Friday from 8:00 until 4:30. In the event that the examiner is not available, his supervisor, Dr. Yogendra Gupta, may be reached at (703) 308-4708.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-0661.



John R. Hardee
Primary Examiner
February 5, 2002